

Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?

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I. INTRODUCTION

Rising litigation costs, congested courts, and the availability of a growing class of professional mediators¹ make alternative dispute resolution (ADR) an attractive alternative to court adjudication. With little relief for the problems of crowded dockets and burgeoning trial expenses in sight, there is a very real possibility that ADR will increasingly be used to resolve problems of general societal concern. This Note examines the increasing use of ADR to resolve familial conflict, specifically focusing upon the use of mediation for couples whose relationships are characterized by a history of violence.² It is only in recent years that the problem of domestic violence, once considered a private matter outside the public's purview, has been redefined as an issue of public concern.

¹ The growth and popularity of ADR, and mediation in particular, is evident. By the mid-1990s, there already existed more than 200 court-connected mediation programs nationwide. See Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, FAM. ADVOC., Winter 1995, at 34, 34. "Professional and institutional support for ADR comes from all positions along the political spectrum; it has produced . . . a recognizable, if not fully coherent, political movement." Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Judicial Subject*, 66 DENV. U. L. REV. 437, 445 (1988). Clearly, the professional opportunities available to mediators are, today, substantial.

² The victims of domestic violence are not, by definition, limited to women. Men, as well as women, can fall victim to the verbal and physical abuse of their spouses. However, women are much more likely to be victimized by their partners than men. A recent study reveals that over two-thirds of violent victimizations against women were committed by someone known to them. Approximately 28% of these incidents were committed by intimates such as husbands or boyfriends. In contrast, men are significantly more likely to be victimized by acquaintances or strangers than by intimates. See RONEE BACHMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 1 (1994). "Annually, compared to males, females experience over 10 times as many incidents of violence by an intimate." *Id.* at 6. Because domestic violence has a disproportionate impact upon women, this Note discusses the domestic violence problem as it pertains to female victims, recognizing that males can also fall victim to such violence.

Reflecting and reinforcing the private conception of domestic violence is the suggestion that ADR can be used to address domestic violence and related familial issues. Unless courts proceed cautiously in channeling domestic relations cases into ADR, there is the potential that ADR will result in the further victimization and isolation of battered women. Coupled with this potential victimization are the dramatic consequences imposed upon society when public matters are too hastily disposed of through private dispute resolution rather than public adjudication.

II. DOMESTIC VIOLENCE: CREATING AN ISSUE OF PUBLIC CONCERN

Until recently, domestic abuse was a hidden, private type of violence. It was a problem of which the public at large was more or less unaware. Indeed, like sexual harassment, the problem of battering and the social and legal construct of the "battered woman" did not exist in this country until the women's movement identified it.³ The genesis of the battered women's movement was in the women's movement of the 1960s.⁴ Through the years, the battered women's movement has dramatically increased public consciousness of the domestic violence problem. The movement has done much to break down the notion that domestic abuse, because it occurs within the context of the home, is a matter of purely private concern.⁵

Feminist theory was a critical underpinning of the battered women's movement. It provides that American society, like most, is a patriarchal society and that, at the core of domestic violence, are issues of gender inequality. "The battered women's movement saw battering as an aspect of fundamental gender relations, as a reflection of male power and female subordination."⁶ Even avid proponents of ADR, recognize the validity of

³ See Elizabeth M. Schneider, *The Violence of Privacy*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 36, 40 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

⁴ See *id.* at 40.

⁵ Traditionally, in this country, battering has been viewed as falling within the private sphere of the family and therefore beyond the law's reach. See *id.* at 42. Historically, husbands had legal responsibility for their wives and children and were therefore permitted to use force to punish their misconduct. See Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 65 (1983).

⁶ Schneider, *supra* note 3, at 40.

feminist theories on domestic violence.⁷ The battered women's movement, with its feminist grounding, did much to bring to the nation's attention the systemic power differences and resulting gender inequality that exists in American society.⁸

"When the battered women's movement began, battered women had, effectively, no legal remedies."⁹ Much has changed over the last several decades. The legal remedies available to battered women, along with statutory reforms addressing the issue, have expanded dramatically.¹⁰ For instance, there are civil remedies such as restraining orders and orders of protection available to promote the physical separation of the battering man from his target. Along with these civil remedies there are criminal statutes which provide for the arrest of batterers, either for the violent act itself or for violation of a restraining order. These civil and criminal remedies are, to one degree or another, available in every state.¹¹

The legal and social resources now available to battered women reflect a redefining of the domestic violence issue as one of public, rather than private, concern. The legal remedies and associated statutory developments "suggest a more public dimension to the [domestic violence] problem, or at least a recognition by governmental bodies, speaking with a public voice, that they must acknowledge and deal with the problem."¹²

⁷ As one such individual recently noted, "[feminists] correctly assume[] the existence of gender inequality and systemic power differences at the level of society." DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 63 (1996).

⁸ The influence of feminist theory on the issue of domestic violence does not begin and end with the battered women's movement. As one observer noted, "theoretical analyses of violence against women can no longer remain credible without incorporating some of the insights of feminism." A. Mark Liddle, *Feminist Contributions to an Understanding of Violence Against Women—Three Steps Forward, Two Steps Back*, 26 CAN. REV. SOC. & ANTHROPOLOGY 759-760 (1989).

⁹ Schneider, *supra* note 3, at 41.

¹⁰ *See id.* at 45.

¹¹ *See id.* at 42. In addition to the new class of legal remedies available to abused women, "there is now a wide range of groups and organizations that have emerged around the country to assist battered women." *Id.* at 41. There are also programs available to work with abusive men. *See id.*

¹² *Id.* at 44. The public nature of the domestic violence problem has been recognized at the highest level of government. For instance, in 1984, the United States Attorney General's Task Force on Family Violence reported that "[t]he legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and abuser." Cynthia Diehm & Margo Ross, *Battered*

However, while domestic violence has taken on a more public dimension, many have suggested that private, informal processes such as mediation can be effective means of handling the domestic abuse issue.¹³ With our judicial system increasingly utilizing mediation to resolve a wide range of family law disputes,¹⁴ it is quite likely that, increasingly, domestic violence cases will find their way into ADR. Indeed, several states have already, by statute, expressly extended mediation to domestic violence cases.¹⁵

A willingness to use ADR in the context of family violence both reflects and reinforces the traditional view that domestic violence is a family problem or, put another way, an issue of purely private concern. As will be demonstrated, the use of ADR in this context can have potentially serious consequences, including, but not limited to, a retrenchment of the old view that domestic violence is an issue outside the public's purview.

III. USING ADR TO ADDRESS ISSUES OF PUBLIC CONCERN: DOMESTIC VIOLENCE

The fact that family law has witnessed a substantial increase in the use of ADR methodologies comes as no surprise. The nonpublic, interpersonal nature of family conflict, almost by definition, makes the resolution of such conflict an appropriate task for social practitioners like therapists and social workers. Mediation, with its focus on communication and private resolutions that are specially tailored to the needs of individual parties, is certainly closer to a therapeutic model than the method of adversarial dispute resolution embraced by the courts.¹⁶ While familial conflict is

Women, in EXPERIENCING RACE, CLASS, AND GENDER IN THE UNITED STATES 403, 405 (Virginia Cyrus ed., 2d ed. 1997) (quoting UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 4 (1984)).

¹³ See, e.g., Salem & Milne, *supra* note 1.

¹⁴ Thirty-eight states already have statutes or court rules that provide for mediation in certain family law cases. See *id.* at 34.

¹⁵ See, e.g., CAL. FAM. CODE § 1816 (West 1994); KY. REV. STAT. ANN. § 403.036 (Michie Supp. 1996).

¹⁶ Dianne Post notes that "mediation is based on a therapeutic theory." Dianne Post, *Mediation Can Make Bad Worse*, NAT'L L.J., June 8, 1992, at 15, 16. In describing the increased referral of domestic violence cases to community boards in San Francisco, John Lemmon points out that the family therapy and family law professionals who sign up for the training provided by the boards are usually interested because they would like to practice mediation privately. See JOHN ALLEN LEMMON, FAMILY MEDIATION PRACTICE 167 (1985).

amenable to informal dispute resolution, the suggestion that ADR should be used to address family issues that transcend the private, mundane nature of family strife is troubling. The suggestion that courts should consider the diversion of battered women to mediation or dispute resolution is particularly problematic.¹⁷

Mediation has long been touted as a litigation substitute that relieves congested courts and lowers costs for the parties.¹⁸ Increasing docket pressures, skyrocketing litigation costs, and the entrenchment of career mediators may very well force more and more family disputes, including those involving violence, into ADR. At this point, it is helpful to bear in mind the degree to which ADR methods such as mediation differ from court adjudication. The distinction was aptly described by Carol Lefcourt:

Mediation is a method whereby disputing parties try to resolve their differences through discussion and compromise. . . . There are no laws, guidelines or standards as to the preferred outcome of mediation. The main goal of the process is agreement, without regard to liability or viability. . . . [In contrast,] [t]he legal process seeks to ensure a just and equitable result that is enforceable in a court. It provides for some standards and predictability based on law. The goals of the legal system are to protect individual rights, compensate civil wrongs, and protect society.¹⁹

The differences between mediation and adjudication are of more than mere academic import. The substitution of mediation for the prosecution of civil and criminal cases poses a potential threat not only to battered women but also to society, as mediation reduces public oversight and discussion of the domestic violence issue. Mediation may also hinder the development and vindication of battered women's legal rights.

¹⁷ It should be noted that many battered women will inadvertently find their way into ADR. While a number of jurisdictions do not explicitly provide for domestic abuse mediation, there is, nevertheless, the very real possibility that domestic violence cases will, under the guise of child custody or support conflict, be inadvertently funneled into mediation given the pervasive nature of such violence and the silence which surrounds domestic abuse. See BACHMAN, *supra* note 2, at 6; *infra* note 35.

¹⁸ See Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 267 (1984).

¹⁹ *Id.* at 267.

A. *The Consequences of Using ADR in Cases Involving Domestic Violence*

There are potential problems with the use of ADR to resolve disputes involving spousal abuse. These problems include the following: (1) the power imbalance between men and women; (2) the mediators' inability to provide to abused women the type of relief they need most; and (3) ADR's more general societal consequences.

1. *Power Imbalance*

At the root of family violence is the issue of power. Social theorists have long recognized that "power [and] control . . . [are the] rewards of family violence [F]orce or its threat is a fundamental part of all social systems, because all social systems are, to one degree or another, power systems."²⁰ The family unit is no exception. The consequences of family violence further increase the rewards for those who desire to control their victims. Repeated violence tends to beat down victims to the point where they will do anything, or say anything, to appease their batterers and avoid violence.²¹

In order for mediation to be effective, there must be a roughly equal distribution of power between the parties.²² While the unequal economic

²⁰ RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 33 (1988). According to the authors, William Goode posits that force or violence is one of four major sets of resources by which people can compel others to serve their ends. The other sets are the following: (1) economic factors; (2) prestige or respect; and (3) likability, attractiveness, friendship, or love. *See id.* at 33-34. While, in recent years, women have made dramatic gains with respect to each of these resource sets, these gains themselves may very well be linked to increased violence against women. As William Stacey and Anson Shupe note:

Pressures for . . . equality . . . may increase family violence, not decrease it. This is because male superiority is still the dominant ideology in our society. . . . [S]ocial changes such as gains for women in legal rights and employment opportunities, which are bringing about greater equality between the sexes, cause strain and frustration for males expecting to retain their traditional authority. The logical outcome is increased violence by men against women.

WILLIAM A. STACEY & ANSON SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 92 (1983).

²¹ *See* GELLES & STRAUS, *supra* note 20, at 34.

²² *See* WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 25 (1988) (recommending to attorneys that they

and social power of men and women make mediation problematic for most women, a battered woman is burdened with the additional disadvantage of coercion based on the fear of violence.²³ Maine's Domestic Abuse and Mediation Project has recognized that "[w]hen abuse exists as a pattern of coercive, controlling, and manipulative behavior, with or without physical violence, it functions to secure power and control for the abuser and to undermine the safety, security, self-confidence and autonomy of the abused person."²⁴

Some advocates of ADR's use in the family law context have recognized the power imbalances at work here. For example, Desmond Ellis and Noreen Stuckless, researchers who downplay the impact of power imbalance on effective divorce mediation, note that structural inequality favoring males is correctly taken for granted by opponents of mediation. They acknowledge that males as a gender group have considerably more power than females as a gender group.²⁵

Proponents, however, downplay the problem of power inequality. As one such individual argued, "[having] correctly assumed the existence of gender inequality and systemic power differences at the level of society, some feminists go on to assume that these differences also characterize individual male and female partners."²⁶ Thus, although a power imbalance favoring men exists at a societal level, an individual male may be more, equally, or less powerful than his female partner.²⁷ Proponents argue that cases involving comparatively weak males are routinely experienced by many family mediators.²⁸

"be cautious about turning to mediation when there is a substantial imbalance in the power or negotiating skills of the parties"); 1 EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* § 9.03, at 9-7 (1995) (noting that "[i]mbalances in power between the parties can lead to an unsatisfactory process and an inappropriate or unfair outcome in mediation").

²³ See Lefcourt, *supra* note 18, at 268.

²⁴ MAINE COURT MEDIATION SERV., *DOMESTIC ABUSE & MEDIATION PROJECT, MEDIATION IN CASES OF DOMESTIC ABUSE: HELPFUL OPTION OR UNACCEPTABLE RISK—THE FINAL REPORT OF THE DOMESTIC ABUSE AND MEDIATION PROJECT* 25 (1992).

²⁵ See ELLIS & STUCKLESS, *supra* note 7, at 63.

²⁶ *Id.*

²⁷ See *id.* at 64.

²⁸ Anecdotal evidence is commonly offered for the proposition that an individual male, although a member of the more dominant gender, can, as an individual, be less powerful than his partner. John Haynes, for example, describes a divorce mediation case in which "the man was physically and emotionally powerful, but was reduced to tears by the thought that his wife might turn his children against him." John Haynes,

The power imbalance that exists between abusive husbands and their victims can not be so easily dismissed. Those who argue that a distinction can be made between societal power imbalances and the balance of power that exists in any individual family relationship overlook the fact that abusive behavior is, by definition, an expression of power.²⁹ Violence itself creates an extreme imbalance of power between the parties.³⁰ This is not to say, however, that there will not be differences in the degree to which any individual abusive male has been, and is able to, exert power and control over his victim. Granted, there will be differences in the economic, social, and emotional resources available to the victim and, accordingly, the degree to which the victim must conform to her partner's controlling behavior. Nevertheless, the imbalance of power and the dynamic of control in the marital relationship mean that the victim of domestic violence lacks the capacity to negotiate freely and fairly.³¹

Further, domestic violence is an expression of power that occurs in a very special setting—namely, the home. Context is important. The fact that the abusive male projects civility or even timidity in the mediation process, a public forum involving nonfamily, reveals little insight into his behavior in the home, where his violent nature is not under public scrutiny and his power is at its apex. It is the private home where the societal power of men is given its most frightening manifestations. The home is key to the abusive husband's violence. "The combination of societal attitudes . . . , with the private nature of the modern family, and the socially structured inequality that is part of every household, makes for a tinderbox of emotions and possible violent outbursts."³²

The personality of the abusive male is a complex one. "As far as scientific research is concerned, they are featureless men. . . . Generally researchers have not been able to learn if batterers, apart from their violent

Power Balancing, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 277, 279 (Jay Folberg & Ann Milne eds., 1988).

²⁹ See *supra* notes 20–22 and accompanying text.

³⁰ See Hilary Astor, *Swimming Against the Tide: Keeping Violent Men Out of Mediation*, in *WOMEN, MALE VIOLENCE AND THE LAW* 147, 150 (Inst. of Criminology Monograph Series No. 6, Julie Stubbs ed., 1994).

³¹ See *id.* at 151. The inequities in power and resources that exist between perpetrators of domestic violence and their victims have practical consequences with respect to the mediation's outcome. Inequality between the parties to a mediation will very often produce nothing more than inexpensive and ill-informed decisions. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

³² GELLES & STRAUS, *supra* note 20, at 35.

episodes, are otherwise decent citizens.”³³ Most experts in the field of family violence do not consider abusive males to be mentally ill or psychotic.³⁴ Hence, identifying these individuals and evaluating the amount of power they yield over their spouses is a formidable task. It is perhaps too much to ask of a mediator, a nonexpert in human behavior, that he both identify abusive males and assess the amount of power they wield over their respective partners.³⁵

Along with an imbalance of power between the parties, domestic violence cases are also characterized by an absence of those ingredients key to effective mediation. As Hilary Astor has noted, mediation requires the parties to have the ability to engage in consensual decisionmaking, which in turn requires a willingness to be honest, a desire to settle the dispute, and

³³ STACEY & SHUPE, *supra* note 20, at 81.

³⁴ *See id.*

³⁵ Mediators may well argue that they have the training, experience, and intuitive capacity to detect a party's inability to mediate. They may argue that they will exclude the dispute from mediation if the victim tells them of the inhibiting effects domestic violence has had upon her. *See Astor, supra* note 30, at 160. “However, the difficulty that mediators face in detecting a lack of capacity to mediate caused by violence is [often] the silence which surrounds violence.” *Id.* Hilary Astor observes, “[w]omen may go to mediation, even when they have strong doubts about it, because they do not want to admit the violence, either to themselves or to other people. The experience of telling other people about violence is often a destructive experience.” *Id.*

It may also be true that, given their own personal economic and professional interests, mediators cannot be counted on to effectively screen from mediation cases involving domestic abuse. As Astor points out:

It could be argued that the reluctance of some mediators to exclude [from mediation] cases involving violence, or to institute rigorous procedures to identify such cases, stems from the fact that effective exclusion would mean that mediators would lose a great number of clients. Given the high incidence of violence in the general population, especially in the separating and divorcing population, effective exclusion would mean that a great many cases would be turned away. Mediation is in a development stage and must prove its utility and its success to clients and to funding bodies. It is also true that many people have made great personal commitments to family mediation. They have given their time, money and work, as well as directing their careers, to the development of family mediation. They desire the establishment and acceptance of mediation and the recognition of their skills and professionalism.

Id. at 162.

some capacity to compromise.³⁶ These type of qualities are unlikely to be within the behavioral repertoire of domestic abusers.³⁷

Mediating in the shadow of violence may well be impossible. Mediation when there is a batterer involved inhibits the battered woman from challenging the batterer's terms or from expressing her own needs—key ingredients to an effective mediation.³⁸ “It is a given, in the process of mediation, that the mediator cannot take sides. Consequently, the results depend on the communication skills of the husband and wife.”³⁹ Hence, it is generally only the husband's view that gets articulated in mediation. The inability of battered women to effectively communicate their feelings and needs will, of course, affect the outcome of the mediation. After all, in his decisionmaking, the mediator can only reflect what he has heard.⁴⁰ When coupled with the natural tendency of males to dominate conversations,⁴¹ the reticence fostered by repeated beatings or threats of beating make effective communication illusory.

Regrettably, public recognition of the problem of power imbalance in domestic violence cases is unlikely to come from within the ADR community. “Because mediation is so closely identified with the values of the private,”⁴² “any challenge to the view of the intact family as the haven in a heartless world threatens the existence of mediation.”⁴³ As a result, mediators are reluctant to adopt any analysis which recognizes that the issue of power relationships in the family is central.⁴⁴ “In particular, an analysis which seeks to deal seriously with the issue of violence against women . . . and consider . . . [its] implications for mediation not only challenges the propriety of a high percentage of [domestic] disputes going to mediation, but challenges the ideological base of mediation.”⁴⁵

³⁶ See *id.* at 151.

³⁷ See *id.*

³⁸ See Lefcourt, *supra* note 18, at 268.

³⁹ Post, *supra* note 16, at 16.

⁴⁰ See Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California*, 1 BERKELEY WOMEN'S L.J. 175, 188 (1985).

⁴¹ See Post, *supra* note 16, at 16.

⁴² Astor, *supra* note 30, at 166. Mediators thus have a tangible stake in the reprivatization of domestic violence issues.

⁴³ *Id.*

⁴⁴ See *id.*

⁴⁵ *Id.*; see also *supra* note 35.

2. *The Relief Needed*

A second major group of concerns associated with the mediation of domestic violence disputes, and family law issues more generally, is the inability of mediation to provide women the type of relief they most need. Mediation hinders, and in some instances precludes, women generally, and battered women in particular,⁴⁶ from obtaining critical physical, financial, and psychological relief.

a. *Physical Safety*

The issues implicated by the use of ADR to resolve family violence extend beyond concerns about the parties' unequal bargaining power.⁴⁶ Battered women often need remedies that are fundamentally inconsistent with mediation such as the arrest of the batterer or his removal from the home.⁴⁷ As Lefcourt observes, "[t]he goals of mediation—communication, reasonable discourse, and joint resolution of adverse interest—work against the most immediate relief the battered woman requires. The goals she seeks are protection from violence, compensation, possession of her home without the batterer, and security for her children."⁴⁸ Only the judicial system has the power to remove the batterer from the home, to arrest batterers, and to enforce the terms of any court decrees.

Maine's Domestic Abuse and Mediation Project has recognized the key role courts must play in any system designed to address domestic violence, including one that incorporates ADR. It recently identified a hybrid approach that couples civil protection from abuse orders with carefully controlled mediation. Under this approach, after the court enters a protection from abuse order, the case is to be assessed by professionals to determine what decisions and interventions are required to resolve those issues that were not settled by the court order but are of importance to the family.⁴⁹ There was consensus among the project members that a discussion concerning withdrawal of a petition for protection or the dropping of criminal charges is never appropriate as part of the mediation

⁴⁶ See Edwards, *supra* note 31, at 679.

⁴⁷ See *id.*

⁴⁸ Lefcourt, *supra* note 18, at 268.

⁴⁹ See MAINE COURT MEDIATION SERV., DOMESTIC ABUSE & MEDIATION PROJECT, *supra* note 24, at 7.

process.⁵⁰ Mediation does not wholly supplant the public court system with a private process or agreement. That is, under the proposed model, mediation would not preclude judicial intervention.⁵¹ Ultimately, the courts would review fully any agreement reached in mediation, including its terms and rationales.⁵² The court would retain the authority to modify the proposed agreement.⁵³ After court approval, the agreement would become a fully enforceable court order.⁵⁴

While a compromise approach such as that favored by some participants in the Domestic Abuse and Mediation Project has appeal, problems with the approach exist. First, like any mediation proposal, the compromise approach is predicated upon voluntariness and a balance of power between the parties, which, as noted above, is largely unattainable where there has been a history of violence between the parties. Moreover, as opponents to the approach observed, any effort to alter or improve the protection from abuse process as set forth in the pertinent statute is largely diversionary and may serve only to impede access to expeditious and extraordinary relief for the abused person.⁵⁵ "Protection from abuse orders and other safeguards must be quickly accessible to abused persons and vigorously enforced to stop violence."⁵⁶

b. *Economic Needs*

The comparatively low cost of mediation is generally perceived as one of ADR's great advantages over court adjudication. Although women, as a class, are more economically powerful than ever before, economic disparities between the genders persist. Further, in a divorce or separation situation, it will more often than not be the woman who has primary financial responsibility for any children the couple might have.⁵⁷ Indeed, child support issues are often a primary topic in family mediation. Thus, from a financial standpoint, ADR may be particularly attractive to women. Unfortunately, "[i]nexpensive, expeditious, and informal adjudication is not

⁵⁰ See *id.*

⁵¹ See *id.* at 19.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at 15.

⁵⁶ *Id.* at 8.

⁵⁷ See Lefcourt, *supra* note 18, at 268.

always synonymous with *fair* and *just* adjudication.”⁵⁸ There is the potential that, with ADR, a woman will get only what she pays for.

Moreover, the money saved from choosing mediation over adjudication may be illusory. The potential long-term financial losses confronting women who use ADR can greatly outweigh short-term savings in legal fees and court costs. Studies have shown that “[t]he money saved by choosing mediators as opposed to lawyers is minimal.”⁵⁹ Even more disturbing is the effect of divorce mediation on child support awards. Mediation does not have the effect of encouraging fathers to be more “financially generous or, for example, to contribute more readily to their children’s college education. Even if there [is] more contact with the children as a result of . . . mediation, this [does] not automatically translate into a higher level of child support.”⁶⁰

Related to the issue of child support is the question of child custody. “A few states are mandating mediation for all cases in which custody has been raised as an issue.”⁶¹ Some have pointed to the unequal commitments of the parties to childrearing as a basis for concern about the use of ADR to resolve child custody issues.⁶² As Lefcourt argues, “[w]omen are typically the primary caretakers of the children both before and after divorce. . . . [They] have a great fear of losing custody, while the husbands have nothing to lose by requesting custody as a bargaining tool.”⁶³

One should view with caution generalizations like that offered by Lefcourt, lest we fall victim to the same kind of stereotyping that, for so long, justified the victimization of women. The motives of even the abusive husband in seeking custody may not be as generally impure as Lefcourt suggests. However, it is probably safe to assume that the perpetrator of domestic violence will be more willing than other men to resort to this method of control. At the very least, there is the potential that women, who often cannot provide economic security to their children without child support, will be forced in mediation to compromise the best interests of their children in return for financial guarantees.⁶⁴

⁵⁸ Edwards, *supra* note 31, at 679.

⁵⁹ Post, *supra* note 16, at 15.

⁶⁰ *Id.* at 16.

⁶¹ Lefcourt, *supra* note 18, at 268.

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *See id.* at 268–269.

Of even more immediate concern than the use of child custody as a bargaining mechanism is the use of mediation to secure joint custody. Joint custody involves shared child care and decisionmaking between mother and father,⁶⁵ which, of course, is difficult to achieve even when the mother and father have the healthiest of relationships; it is impossible to achieve in a relationship characterized by hostility and violence. That notwithstanding, joint custody is a desirable outcome from the standpoint of ADR.⁶⁶ After all, joint custody is the epitome of compromise. It is "the ideal result of mediation because the goal of mediation is to agree rather than to discover the best interests of the child."⁶⁷

Property issues are sometimes referred to mediation either alone or in conjunction with other issues. Referring the division of marital property to mediation is problematic. Lefcourt has noted that "[o]btaining full disclosure of the marital assets is a critical prerequisite to formulating any property division."⁶⁸ This disclosure will be particularly difficult to obtain when there is a history of violence on the part of the husband. "Since most batterers are extremely controlling, the wife rarely has equal knowledge of the family finances"⁶⁹

In contrast to mediation, the legal system has several means of obtaining disclosure from a recalcitrant spouse. These means include depositions, the subpoenaing of records, and coercive penalties for noncompliance or false statements.⁷⁰ As with other aspects of mediation, the mediator must rely upon the goodwill of the parties when discovering marital assets.⁷¹ Specifically, the mediator must rely upon statements made by the individual who controls the family's assets, who more often than not, and especially in an abusive household, will be the husband.⁷² There is, of course, something anomalous about a process which relies upon the "goodwill" of one who is prone to engage in violent behavior. Clearly,

⁶⁵ See *id.* at 269.

⁶⁶ The issue of joint custody is one area in which ADR and court adjudication do not greatly diverge. In recent years, courts have increasingly settled child custody disputes by ordering shared child care. See Alison Harvison Young, *Joint Custody as Norm: Solomon Revisited*, 32 OSGOOD HALL L.J. 785, 786 (1994).

⁶⁷ Lefcourt, *supra* note 18, at 269.

⁶⁸ *Id.* at 268.

⁶⁹ Post, *supra* note 16, at 16.

⁷⁰ See Lefcourt, *supra* note 18, at 268.

⁷¹ See *id.*

⁷² See *id.*

"[f]air and equitable standards [for property division] must be developed . . . through legislation, litigation and the appeal process."⁷³

c. Psychological and Emotional Needs

Finally, mediation, even when tempered by significant court action, may have the deleterious tendency of limiting the empowering effect that court action has upon abused women. An empirical study of battered women's experiences in obtaining restraining orders in Connecticut concluded that the process of obtaining a temporary restraining order can itself be one of empowerment.⁷⁴ For instance, attorneys who are retained by or on behalf of battered women have, at a minimum, a professional obligation to listen to their clients, to give them time and attention, and to promote their interests exclusively.⁷⁵ Dianne Post summarizes mediation's failure to provide for the psychological needs of the battered woman:

Mediation forces [the battered woman] to focus on the wrong issues. Having been beaten and having escaped, the woman is finally able to express her anger. That is perfectly normal and a necessary healing stage. But for the purposes of mediation, it is not appropriate. Separation is necessary for the woman to heal and learn to avoid manipulation. Mediation does not allow that. Battered women need to learn to speak out for their own needs, having till now subordinated them totally to those of their husband[s]⁷⁶

The goals of mediation are largely antithetical to the immediate needs of battered women. The goals of mediation—reaching agreement,

⁷³ *Id.*

⁷⁴ See Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 243-244 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

⁷⁵ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980) ("[A] lawyer should always act in a manner consistent with the best interests of his client."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1980) ("A lawyer shall not . . . [n]eglect a legal matter entrusted to him."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998) ("A lawyer shall abide by a client's decisions concerning the objectives of representation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1998) ("The [lawyer] advocate has a duty to use legal procedure for the fullest benefit of the client's cause").

⁷⁶ Post, *supra* note 16, at 16.

reconciliation, and recognition of mutual responsibility⁷⁷—are clearly inconsistent with the goal of stopping the violence, which should be the primary objective of any system.⁷⁸ In addition to physical safety, which can only come from physical separation of the abuser and the abused, the battered woman needs the economic security and psychological satisfaction that can only come from the more empowering process of court adjudication.

3. *Societal Considerations*

Court adjudication of domestic violence cases not only provides battered women with important physical, economic, and psychological relief, it also carries with it benefits for the larger society. These benefits include increased visibility of the domestic violence problem to the public, the continued development of legal rights for battered women, and the vindication of those legal rights which already exist.

a. *Public Oversight and Discourse*

The public's interest in court adjudication of domestic violence cases can be seen in the criminal remedies it has fashioned to deal with perpetrators of such violence. "[C]riminal remedies . . . and mandatory arrest . . . send a clear social message that battering is impermissible, and, because criminal remedies are prosecuted by the state," the message has significant public force.⁷⁹ Even civil remedies such as orders of protection can send a social message. Like their criminal counterpart, civil actions use formal court processes and are subject to public scrutiny.

Members of Maine's Domestic Abuse and Mediation Project disagreed over the degree to which mediation, coupled with abuse protection orders, has the effect of undercutting public policy on domestic abuse. The dispute is typical of that between proponents of mediation and most feminist scholars. Opponents of any use of mediation argue that it has the effect of legitimizing, or at least minimizing, the harm caused by the abuser. According to opponents, any remedy available to abused women "must

⁷⁷ See Lerman, *supra* note 5, at 83–87.

⁷⁸ See *id.* at 83.

⁷⁹ Elizabeth M. Schneider, *The Violence of Privacy*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 388, 393 (D. Kelly Weisberg ed., 1996).

promote the public accountability of the perpetrator, enforcement of [any] protection from abuse order, and the abused person's right to live a life independent of the abuser."⁸⁰ ADR remedies cannot achieve these goals because "[m]ediation treats critical safety and protection issues . . . as ancillary matters helpful for the restructuring of the family but not critical in terms of desistance, safety, or autonomy."⁸¹

The mediation process is directly at odds with society's need to oversee the handling of domestic abuse cases. Without this oversight, the commitment that society has shown to battered women, as reflected in the laws passed to protect them, cannot be given effect. Mediation, a private process that is largely immune from public scrutiny, leaves society in the dark as to how, if at all, its institutions are handling the victims and perpetrators of domestic violence. Lefcourt aptly describes the situation:

Removal of family disputes from the "public" legal system endangers the advancements made thus far. For continued progress, the judicial system and legislative bodies must be monitored and prodded to achieve the ideal of equal treatment. Mediation is anathema to this process for several reasons:

1. There are no standards to guide the outcome of the mediation process, as there are in the legal system.
2. Mediators are untrained and unlicensed and, therefore, both the process and the outcome of mediation will have countless, inconsistent variations.
3. There is no accountability of mediators to the public.
4. Mediation of family disputes places the issues outside the legal system, removing them from the source of enforcement power of the state.
5. Mediation trivializes family law issues by placing them outside society's key institutional system of dispute resolution—the legal system.⁸²

The use of mediation and the resulting privatization of the domestic violence issue serves to stifle public scrutiny, discourse, and awareness of this problem.⁸³ The past two decades have seen an increase in the court-

⁸⁰ MAINE COURT MEDIATION SERV., DOMESTIC ABUSE & MEDIATION PROJECT, *supra* note 24, at 15.

⁸¹ *Id.*

⁸² Lefcourt, *supra* note 18, at 267–268.

⁸³ Public scrutiny of, and discourse upon, public issues and public law is a fundamental value underlying our constitutional scheme. The United States Supreme

based remedies that are available to battered women, and which have, at least to some extent, fostered public scrutiny and public control.⁸⁴ This public scrutiny and control is lost when family violence is privatized through the mediation process. The opportunity for society to make an "important statement about the public impact of purportedly private conduct" is irretrievably lost.⁸⁵ The use of mediation in domestic violence cases may reinforce the long-standing notion that domestic abuse is not a concern of the state, at least not to the same degree as other deviant behavior. More generally, the use of mediation reflects the view that the problem of domestic violence is one of purely private concern.

b. The Development of Battered Women's Legal Rights

In addition to limiting public scrutiny, control, and discourse, the privatization of domestic violence through mediation can have the related effect of diminishing the judicial development and vindication of legal rights for disadvantaged groups such as battered women.⁸⁶ Professor Anthony Amsterdam argues that ADR may result in the reduction of possibilities for legal redress of wrongs suffered by the poor and underprivileged "in the name of increased access to justice and judicial efficiency."⁸⁷ As Chief Judge Harry Edwards observes, "by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law."⁸⁸

Court has recognized what it considers the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Rosenbloom v. Metromedia*, 403 U.S. 29, 43 (1971) (emphasis omitted) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964)). According to the Court, "[t]he community has a vital interest in the proper enforcement of its criminal laws, particularly in an area . . . where a number of highly important values are potentially in conflict: the public has an interest . . . in seeing that the criminal law is adequately enforced." *Id.*

⁸⁴ See *Schneider*, *supra* note 3, at 45.

⁸⁵ *Id.*

⁸⁶ See *Edwards*, *supra* note 31, at 679.

⁸⁷ Anthony G. Amsterdam, Remarks at the Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit (May 21-22, 1984), in 105 F.R.D. 251, 291 (1985).

⁸⁸ *Edwards*, *supra* note 31, at 679. Edwards asks us to imagine "the impoverished nature of civil rights law that would have [developed] had . . . race discrimination cases in the [1960s] and [1970s] been mediated rather than adjudicated." *Id.*

Edwards points to family law mediation in support of his position that ADR can lead to "second-class justice."⁸⁹ Recognizing that women have belatedly gained many new rights, including laws which protect battered women, he notes that "[t]here is a real danger . . . that these new rights will become simply a mirage if . . . 'family law' disputes are blindly pushed into mediation."⁹⁰ Edwards argues that there will be many cases that require nothing less than judicial resolution. He warns that "[a]t the very least we must carefully evaluate the appropriateness of ADR in the resolution of particular disputes."⁹¹

Lefcourt notes that, in many instances, women have attained the rights described by Edwards in theory only.⁹² These rights can only have tangible force if they are "developed, strengthened and applied in individual cases. . . . Thus, [a] push toward mediation threatens and undermines efforts and achievements by women in the family law arena."⁹³ Professor Amsterdam offers a similar view of the relationship between ADR and the legal rights of the disadvantaged:

The potential assertion of legal rights, the continuing development by courts of a body of legal rights, and the possibility of recourse to a court to adjudicate legal rights are the only significant leverage of the economically and politically weak against the economically and politically strong in forums outside the law. . . . Without law and courts, [the disadvantaged] have nothing to say that a powerful opponent or self-appointed helpmate is bound to respect.⁹⁴

While ADR's true impact on the rights of the disadvantaged is, as yet, unclear, the views expressed by Edwards and others are worthy of serious consideration. The courts have long been a significant, if not the most significant, vehicle for the development and vindication of individual rights. We would be well served to proceed cautiously in developing and using any alternative dispute resolution system that can affect, in any way, the rights of society's disadvantaged. ADR may very well prove to isolate and

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 680.

⁹² See Lefcourt, *supra* note 18, at 267.

⁹³ *Id.*

⁹⁴ Amsterdam, *supra* note 87, at 290-291.

privatize,⁹⁵ to an unacceptable degree, the disadvantaged and their plights. ADR and its potential impact on victims of domestic abuse is but one example.

B. *ADR and the Decriminalization of Domestic Violence*

The justifications commonly put forth for ADR's use in domestic violence cases share a common foundation in the failure of the legal system. For example, one proponent defends ADR as follows:

The problem for the victim is that a "peace bond" telling a man to stay away from his spouse is not the powerful deterrent it's generally thought to be. Such a court order does not mean two large deputies sit in front of her home and follow her to work to prevent him from accosting her. He may still harass her in person and by telephone

Courts are hesitant to interfere in family life without compelling evidence of need. This is exasperating to potential victims, who are told by police, "We can't act until he does something."⁹⁶

Similarly, Lisa Lerman suggests that "a good mediator can do more for battered women than a bad prosecutor" because many courts either refuse to prosecute domestic violence cases or do little once they reach court.⁹⁷ Thus, under the views set forth above, the use of ADR in cases involving domestic violence is desirable simply because law enforcement officials have let victims down.

This kind of reasoning places ADR on a precarious foundation. The fact that existing law enforcement mechanisms are deficient in practice does not mean that they are flawed in theory. Proponents of ADR act too hastily in calling for the use of ADR methodologies in domestic violence cases

⁹⁵ The causal relationship between ADR and the privatization of domestic violence is a complex one. Academic and public interest in domestic violence appears, to this Author, to have peaked in the mid- to late-1980s. Diminished interest in the subject has important ramifications for ADR. The general lack of attention focused on domestic violence today fosters the private conception of the domestic violence issue. This private conception in turn makes the diversion of domestic violence cases into ADR easier. Of course, the increased use of ADR further diminishes public focus on domestic violence. Public disinterest and the use of ADR are thus mutually reinforcing.

⁹⁶ LEMMON, *supra* note 16, at 12-13.

⁹⁷ Lisa G. Lerman, *Stopping Domestic Violence: A Guide for Mediators*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 429, 430 (H. Davidson et al. eds., 1982).

before any re-examination and strengthening of existing law enforcement mechanisms has been attempted.

The use of ADR in domestic violence cases represents a significant step toward privatization and decriminalization of family violence; it is a bold step. In no other context is it even suggested that the victim of a violent crime sit down with the perpetrator and be forced to listen to "his side of the story."⁹⁸ As a general matter, the needs of a violent criminal are simply not his victim's concern.

Requesting the victim's presence for a discussion with the perpetrator demonstrates a belief that the victim is somehow responsible for the abuser's actions.⁹⁹ "The general implication is . . . that both parties must change."¹⁰⁰ The use of mediation in cases of domestic violence reflects the unfortunate view that domestic assault is a private matter, an act committed against an individual rather than against society as a whole.

At bottom, wife battering is criminal behavior. As such, it should be the exclusive province of the courts and law enforcement officials to address this behavior. "Despite the problems that plague the criminal [justice] system, the solution to battering is not to decriminalize it. Instead,

⁹⁸ LEMMON, *supra* note 16, at 131.

⁹⁹ The mediation process has been described as causing the abused person to infer that she "is responsible for her own abuse and that she had the power to end it. . . . The replacement of judicial procedure with a consensual process may imply that abuse is a joint problem, generated by both parties" MAINE COURT MEDIATION SERV., DOMESTIC ABUSE AND MEDIATION PROJECT, *supra* note 24, at 16. These feelings are a natural response on the part of the battered woman. As Dianne Post notes, "[m]ediation is based on a therapeutic theory." Post, *supra* note 16, at 16. This therapeutic underpinning leaves battered women with the mistaken notion that they are ill.

¹⁰⁰ Post, *supra* note 16, at 16. As incredible as it may seem, ADR's use in domestic abuse cases has been expressly justified on the basis of the battered women's responsibility for the violence. In 1979, Paul Rice suggested that, because domestic violence can sometimes be partly the woman's fault, it is inappropriate for the justice system to file charges solely against the husband, thereby placing full responsibility upon him. Mediation is advanced as an effective way to force both the abuser and abused to accept his or her share of the responsibility. See Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System: An Overview and Legal Analysis*, 29 AM. U. L. REV. 17, 22 (1979). "Victim blaming theories" are extremely problematic and have been discredited by those in the pertinent fields. See generally Dianna R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 LAW & INEQ. J. 493, 495-497 (1984). While these views are rarely articulated today, it is not at all clear that the values underlying these views do not continue to find quiet support.

reforms must be made in both the social structure that institutionalizes violence against women and the criminal system that refuses to punish this violence."¹⁰¹

C. *ADR and Domestic Violence: A Family Affair?*

One justification for ADR that is not commonly put forward by its proponents, but which many opponents believe is at the root of ADR's use in domestic violence cases, is ADR's tendency to promote the sanctity of the family unit. The association of ADR with family values can be viewed from a power-perspective. For instance, it has been argued that an increase in the popularity of ADR reflects a recognition that "[s]tate intervention to stop wife abuse would deprive the patriarch of his authority within the family unit."¹⁰²

Others see ADR as an attempt to vindicate an overly romantic, idealized perception of the family. The family unit is still very much the touchstone of American society, and its preservation remains of utmost concern to many Americans. ADR, which focuses on reconciliation rather than confrontation, is far more likely to preserve the family unit than any law enforcement model.¹⁰³ From this, ADR draws a measure of appeal. As Lerman notes, "[d]espite the rising divorce rate and increasing social acceptance of single adulthood and sequential marriages, theorists continue to justify state inaction with regard to intrafamily crime, and to encourage private resolution of violent disputes."¹⁰⁴

The problem with viewing ADR as a means of preserving the family is that such a view overlooks the fact that certain types of relationships, including some within the family, are simply not worth preserving.¹⁰⁵

¹⁰¹ Stallone, *supra* note 100, at 518.

¹⁰² Lerman, *supra* note 5, at 77.

¹⁰³ See Astor, *supra* note 30, at 163-167. Hilary Astor observes that, because ADR appears to rescue the values of the intact family, it has tremendous emotional appeal. According to Astor, ADR can be represented as having the capacity to preserve the family because ADR, in contrast to court adjudication, embodies the qualities of the private. Mediation, for example, appears intimate, confidential, and caring. "It has the capacity to make the family look like the ideal image of the family, and to do so at the very point at which this image is most threatened." *Id.* at 163.

¹⁰⁴ Lerman, *supra* note 5, at 77.

¹⁰⁵ As Stallone notes, maintaining the family unit is not always in the best interest of the battered woman. Studies have shown that "the frequency of contact between the batterer and the victim [is] the foremost indicator of the frequency of violence. . . . To

"[The] essentially romantic view of marriage leads to policy proposals which fail to take account of marriages in which mutual trust is unknown and act-oriented rules are needed to protect women from assaults by their husbands."¹⁰⁶ In designing systems to address marital conflict, we should take a realistic view of the family as it has always existed—a potential tinderbox of hatred and violence. "The view of marriage as a close, private, permanent unit in which there is universal trust and willingness to compromise is [simply] not a sound model to use in designing services for people seeking help with marital problems."¹⁰⁷

In any case, ADR has not proven to be an effective means of preserving disintegrating families. Although closer to a therapeutic model than a law enforcement model, ADR is not family therapy in its traditional sense.¹⁰⁸ To the extent that ADR embraces a therapeutic objective, it has not proven itself very effective. As Astor observes, "[d]espite some early optimism the evidence that [ADR] can effect personal change or the improvement of relationships is very slim."¹⁰⁹

IV. PUBLIC ISSUES AND THE ROLE OF ADR

The concerns addressed in this Note extend beyond the context of domestic violence to any problem of public concern that has been, or can potentially be, funneled into ADR. As demonstrated, the resolution of public issues in a nonpublic setting can potentially harm, to varying degrees, the disadvantaged in society, the public, and the legal system as a whole.

This is not to imply, however, that ADR cannot play an important role in the American legal system. Indeed, with courts' dockets becoming increasingly crowded and litigation costs skyrocketing, ADR may

the extent that the primary *effect* of mediation is to keep the violent family together, mediation perpetuates violence." Stallone, *supra* note 100, at 509 (citations omitted).

¹⁰⁶ Lerman, *supra* note 5, at 79.

¹⁰⁷ *Id.*

¹⁰⁸ In a mediation session, emotions related to the conflict being mediated are permitted to "emerge but are not explored in great depth. While strong . . . feelings can be acknowledged in mediation, [only a social or medical] therapist [can thoroughly] explore and work on these feelings." MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICT: A PATHWAY TO PEACE* 35 (1995). Nevertheless, "mediation and therapy share a set of core skills related to good communication and problem solving." *Id.* at 36.

¹⁰⁹ Astor, *supra* note 30, at 166.

ultimately prove to be an indispensable feature of American jurisprudence. With its emphasis on reconciliation and compromise, ADR, if its use were to become sufficiently widespread, could very well have the desirable effect of changing the culture of interpersonal conflict in our society by conveying to Americans that they themselves are the primary source of solutions to their disputes.

That said, there are issues of general societal concern, involving historically disadvantaged groups, that courts should be reluctant to channel into ADR. Domestic violence cases are one example of this kind of case. Cases of this kind are best addressed through public adjudication, the traditional protector of the disadvantaged.

With respect to domestic violence cases, the question that naturally arises is: Given the difficulty courts will have in discovering a history of violence between spouses, should any familial issues be channeled into ADR? There is some support for the view that problems of power imbalance between husbands and wives make ADR improper for domestic relations cases regardless of whether there exists a history of violence.¹¹⁰ Suffice it to say that a history of domestic violence exacerbates the deficiencies of ADR. Where law enforcement officials are aware of a husband's violent nature, ADR should not be considered as an option. At a minimum, "[a]ll domestic relations cases being considered for mediation should be screened for abuse. If screening cannot be instituted, mediation services must not be offered."¹¹¹

V. CONCLUSION

The use of mediation for cases in which there is a history of domestic violence constitutes an economic, psychological, and emotional victimization of abused women. It is no solution to say that mediation under these circumstances should be strictly voluntary. Indeed, because domestic abuse is, today, criminal behavior—an act committed against the state—victims of domestic violence should not be afforded the opportunity to direct domestic violence away from public adjudication. It is only because important segments of American society continue to adhere to the old notion that domestic violence is a private matter between private parties that we would allow perpetrators of such violence to escape state sanctions

¹¹⁰ See Lefcourt, *supra* note 18, at 268.

¹¹¹ MAINE COURT MEDIATION SERV., DOMESTIC ABUSE AND MEDIATION PROJECT, *supra* note 24, at 26.

through mediation. The use of mediation at once reflects and reinforces the old view.

Most disturbing is the possibility that the use of ADR will cause further reversion to the belief that solutions to the domestic violence problem, and support for its victims, do not lie with the state. At a minimum, the use of ADR in this context constitutes a retreat from the promise presented by the successes of the battered women's movement—that abused women will have, in the legal system, a protector.

With litigation costs rising and court dockets swelling, it is likely that issues of public concern will increasingly find their way into ADR. Domestic violence is, of course, unique in that it has long been regarded as a private issue. Certainly, many people continue to adhere to this view. Nevertheless, there is the real potential that more firmly rooted public matters will find their way into ADR, especially those issues which, like domestic violence, involve parties that are financially or emotionally disadvantaged. The plight of society's weak and underprivileged is most easily channeled into ADR. It is, after all, these segments of society which tend to be financially, intellectually, and emotionally unwilling or unable to demand the legal remedies available to them.

The losers here are not only individual classes of disadvantaged people but American society as a whole. When public matters are funneled into ADR, the American people lose, among other things, the opportunity to vindicate and develop the legal rights of the oppressed. But most importantly, it is American society itself that must bear the burden of knowing that it and its institutions are turning their backs on those segments of the population most in need of protection.

There exists today an established regime of professional mediators who believe themselves equipped to handle matters of increasing societal importance. Many of these individuals have, to date, demonstrated a willingness to close their eyes to the enormous costs that ADR can impose on disadvantaged individuals and society as a whole. While these are costs that some in and outside ADR can apparently live with, they are ones that America cannot afford to pay.

